Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

DAN ENRIGHT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Dated: June 22, 2005

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QUESTIONS PRESENTED

I. Was it proper to deny petitioner Enright's claim of ineffective assistance of counsel by holding that "even if [trial counsel] misunderstood the law, it was not due to any failure by him to adequately prepare for Enright's defense," and that "Enright has not alleged that [trial counsel] failed to research his position," in a case where the undisputed facts show that:

(1) Enright's trial counsel clearly misadvised him about what the government had to prove (the elements of the offense) in order to convict him, and

(2) Enright rejected a favorable plea offer because he believed that the government could not prove what his trial counsel had incorrectly told him that the government would have to prove, and

(3) Enright would have accepted the plea offer had he been correctly advised on the elements of the offenses with which he was charged?

II. Where a very favorable plea overture made by the prosecutor to defense counsel is not pursued by the defendant because defense counsel incorrectly advises him on the law such that he believes he will prevail at trial and therefore does not need to plead guilty and bargain for a lesser sentence, is it proper to dismiss an ineffective assistance claim made by

reason of that mistake because there was no "formal" plea proposal despite the fact that the prosecutor had said he would be agreeable to a sentence within a certain, specific range?

III. Does the "highly deferential" scrutiny courts give when considering trial counsel's tactical judgments made during trial apply to an ineffective-counsel claim involving a lawyer's clearly mistaken advice (made pre-trial) about the elements of the offense which the government must prove at trial?

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OPINIONS BELOW

The judgment of the United States Court for the Third Circuit, entered on March 24, 2005, denying petitioner's motion for a Certificate of Appealability to allow review of the District Court's order denying petitioner's ineffective assistance of counsel claim, is reproduced in the Appendix ("App.") at App. 1a. The Memorandum and Order of the District Court denying petitioner's claim of ineffective assistance of counsel, entered on December 10, 2004, is reproduced at App. 3a-20a. It is reported, *Enright v. United States*, 347 F.Supp.2d 159 (D.N.J. 2004).

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals denying the Motion for a Certificate of Appealability by which petitioner sought review of the District Court's denial of his ineffective-counsel claim was entered on March 24, 2005. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 2254.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part that:

> In all criminal prosecutions, the accused shall enjoy the right to be represented by counsel ...

Title 28 U.S.C. § 2255 provides in pertinent part:

> A prisoner in custody under a sentence of a Court established by an Act of Congress, claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or the laws of the United States ... may move the court which imposed the sentence to vacate, set aside, or correct the sentence.

STATEMENT OF THE CASE

Summary of the 2255 Claim

Petitioner Enright was charged with the willful failure to collect and pay federal and state excise taxes due and owing on numerous sales of motor fuel made by his company PetroPlus, Inc. ("PetroPlus"). Before trial, he rejected a favorable plea offer (which would have cut his sentence to less than half) because his lawyer misinformed him about what constituted the crimes charged and thus what the government had to prove to convict him. He thought he would be acquitted.

Specifically, trial counsel told Enright that the government had to prove not only that the taxes were owed by his company, but also that Enright *knew* that his company, rather than his company's supplier, was the taxpayer. His lawyer also told him that even if he knew that his supplier had not collected the taxes on the motor fuel sold by that

supplier to Enright's company, and Enright thereafter resold that fuel without paying taxes on it, he was not guilty unless he knew his company was the taxpayer.

As shown below, that was absolutely incorrect because the law clearly is that as long as Enright knew that anyone from whom he had purchased the fuel had not paid the taxes, he was criminally liable for their non-payment when he sold them without himself collecting the taxes due and owing. Yet based his lawyer's "misreading"[1] of the law he believed that he was not guilty because he believed that his supplier, not he, was the taxpayer. He thus thought he would not be convicted, went to trial, was convicted, and was sentenced to 200 months instead of the 70 to 80-month sentence he would have served had he accepted the plea offer.

Enright's petition contends that his trial counsel was ineffective by misadvising him on the law and thus causing him to reject the plea offer that, but for the incorrect advice, Enright would have taken. See, e.g. *United States v. Gordon*, 156 F.3d 376 (2d Cir. 1998)(counsel was ineffective where client rejected a plea offer with exposure to 9 years based on counsel's incorrect advice that the maximum was 10 years, but ultimately received 22 years); *Boria v. Keane*, 99 F.3d 492, 496-97 (2d Cir. 1996) (counsel ineffective where does not advise client to accept a plea offer of three years and he

[1] "Misreading" is how the Third Circuit Characterized the mistake made by counsel in it decision on Enright's direct appeal. See below.

ends up receiving a 10 year sentence since his guilt was so obvious).

Trial Counsel's Mistake on the Law

We start with the unheard of justification advanced by the court below for the mistake the trial counsel made. The district court held that "even if [trial counsel][2] misunderstood the law, it was not due to any failure by him to adequately prepare for Enright's defense," [App. 19a; *Enright, supra*, 347 F.Supp.2d at 168] and that "Enright has not alleged that [trial counsel] failed to research his position." *Id.*

In other words, while acknowledging that trial counsel was "clearly wrong" (see below), the court below seemed to give him an "A" for effort, and concluded that this satisfied Enright's Sixth Amendment right to counsel, disregarding *Boria* and *Gordon, supra.*

At Enright's trial, there was never any dispute that the taxes on this motor fuel had not been paid. The real question was whether Enright *knowingly and willfully* failed to pay the taxes due and owing. As the District Court noted during Enright's trial: "state of mind will be everything here." [Tr. 1815][3]

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[2] When "trial counsel" appears in parenthesis, we have simply substituted that term for the actual name; the quote is otherwise *verbatim.*

[3] "Tr." refers to the trial transcript which is cited to show the accuracy of the facts as stated.

Later, in its decision denying Enright's ineffective-counsel claim, the district court clearly acknowledged both the centrality of Enright's specific state of mind defense, and that it was "crystal clear" that counsel was wrong:

> At trial, Enright's defense was based upon creating a reasonable doubt as to whether PetroPlus was in fact the taxpayer or that Enright had the requisite willfulness because he did not know PetroPlus was the taxpayer. [Trial Counsel] repeatedly and unsuccessfully argued that the government had to prove that Enright knew that PetroPlus was the company responsible for paying the excise taxes, pursuing a jury instruction to this effect.

App. 6a-7a; *Enright, supra*, 347 F.Supp.2d at 162, (Emphasis added) The Court, during trial, had noted that the law was "crystal clear" that the defendant "need not know who the taxpayer is." [Tr. 14895] It therefore instructed the jury as follows:

> The test is whether a defendant knew that all properly reportable excise taxes due under the Internal Revenue Code had been reported.

The district court also acknowledged the total lack of legal support for trial counsel's mistaken view of the law: "I can't find a legal basis for that." [Tr. 14895]

The Court of Appeals affirmed Enright's conviction and sentence on direct appeal in an unreported decision which bluntly held that Enright's defense at trial was based on a complete misunderstanding of the law.

For example, the Third Circuit held:[4]

> Enright is incorrect in his assertion that the government had to prove that Enright knew that PetroPlus owed the taxes at issue. App. 27a.

and:

> We disagree with such a theory of the case . . . Whether he knew who the ultimate taxpayer should have been is irrelevant." App. 29a-30a.

Driving counsel error home, the Third Circuit held that the defense to which Enright's counsel had had clung was "based upon a misreading of the indictment." App. 31a.

Yet so completely convinced was Enright (because his counsel had advised him thus) that the government had to prove that he knew PetroPlus, not someone else, was the taxpayer, that Enright even took the stand and admitted that he knew the people from who he bought the fuel had not paid the taxes, but genuinely believed that his

[4] Because it is not reported, we attach the Third Circuit opinion on Enright's direct appeal, from which we quote, as App. 21a-43a.

company did not owe the taxes and thus that he was not guilty of the knowing and willful evasion of those taxes. Again, as the district court noted in denying his 2255 petition:

> The trial culminated with Enright's admission, on the stand, that he knew that the excise taxes were not being paid for the fuel PetroPlus purchased. This Court characterized such testimony as "shocking," and noted that Enright had flat out admitted his guilt. (Citations omitted).

App. 7a; *Enright, supra*, 347 F.Supp.2d at 162. Enright, relying on counsel, thought that this testimony was a defense:

> In fact I took the stand and told the jury I was aware that my suppliers had not paid their taxes on the fuel. But I thought this was a defense since I also told the jury that I had never believed that PetroPlus was the taxpayer, and I thought (based on (trial counsel's) advice) that this belief had to be proved to convict me.

[Enright Affidavit, submitted below. ¶9] Enright's words at his sentencing some four years before he filed his 2255 petition really sum it up, when he told the district court that: